Delmas Conley d/b/a Conley Trucking *and* General Truck Drivers and Helpers Union Local #92, International Brotherhood of Teamsters. Cases 9–CA–42437 and 9–CA–42562

January 31, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On September 26, 2006, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Conley Trucking, Portsmouth, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

"(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files, including Timothy Gilbert's personnel file, any reference to his discharge, and within three days thereafter notify Timothy Gilbert in writing that this has been done and that the suspension and discharge will not be used against him in any way."

Jonathan D. Duffey, Esq., for the General Counsel.

R. Alan Lemons, Esq., of Portsmouth, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. The Board's General Counsel issued a consolidated complaint in this matter on February 23, 2006, against Delmas Conley d/b/a Conley Trucking (the Respondent). The consolidated complaint was based on charges filed November 4, 2005, by the General Truck Drivers and Helpers Union Local #92, International Brotherhood of Teamsters (the Teamsters or the Union) in Case 9-CA-42437, amended December 7, 2005, and charges filed on January 11, 2006, in Case 9–CA–42562. An amendment to the consolidated complaint was dated April 11, 2006. Respondent filed an answer to the consolidated complaint and an answer to the amendment denying that it violated the Act in any manner.

This matter was tried before me in New Boston, Ohio, on April 26 and 27, 2006. The record was held open until May 26, 2006, so that the parties could review additional records. Counsel for the General Counsel and counsel for Respondent filed briefs in support of their positions on June 30, 2006. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a sole proprietorship, is engaged in the hauling of various materials from its facility in Portsmouth, Ohio, where it annually performs services valued in excess of $50,000 for customers outside the State of Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

Delmas Conley owns Conley Trucking and employs approximately 45 to 50 employees, including 35 truckdrivers who haul and deliver gravel, sand, salt, and stone in dump trucks for customers within an approximately 100-mile radius of Ports-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] We find it unnecessary to address the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees that bargaining with the Union would start from zero. The Respondent's exceptions to this conclusion do not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules and Regulations. The Respondent merely cites to the judge's decision and fails to allege with any degree of particularity, either in its exceptions or its brief in support thereof, the error it contends the judge committed, or on what grounds it believes the judge's decision as to this violation should be overturned. In these circumstances, we find in accordance with Sec. 102.46(b)(2) that the Respondent's exception on this point may be disregarded. See, e.g., *Thriftway Supermarket*, 294 NLRB 173 fn. 2 (1989). We therefore adopt the judge's findings and conclusions on this violation, pro forma, without addressing their merits.

There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by threatening to sell its trucks and to reduce its employees' pay, and by threatening job loss and plant closure in late October and early November 2005.

[3] We will modify the judge's recommended Order to correct two minor, inadvertent mistakes.

[1] General Counsel's unopposed posttrial motion to withdraw complaint pars. 5(e), (f), and (g) is hereby granted. In addition, General Counsel's motion to correct errors in the transcript is unopposed and hereby granted. I add that the record transcript and exhibits bear erroneous captions and erroneously indicate in the heading that the case is before the United States Department of Labor. On my own motion the transcript is amended to reflect the correct caption and heading set forth above.

mouth, Ohio. Delmas' sons, R.J. and Rodney Conley, are actively involved in running the operation. A son-in-law, Rodney Holden, works in the office and writes payroll checks, takes orders from customers, and performs other personnel and administrative tasks. Delmas, RJ, Rodney Conley, and Rodney Holden are admitted agents of Respondent.

The Teamsters conducted some leafleting of the Conley facility in June or July 2005,[2] and ultimately filed a representation petition on October 31. Conley Trucking opposed unionization and distributed leaflets and a mailing to employees explaining bargaining and permanent replacement prerogatives of employers and asking employees not to support the Teamsters. (R. Exhs. 7–9.) A representation election was never conducted. In November, the Teamsters announced to supporters at a meeting that they were abandoning the petition due to a lack of support among employees.

On Friday, October 28, Respondent fired truckdriver Timothy Gilbert. Gilbert had attended a union meeting—his first—on the previous Sunday, October 23. On Thursday, October 27, Gilbert had told a supervisor, and later left a phone message indicating, that he would not be at work the next morning because he needed to care for his ill wife. Friday afternoon when he and his daughter came by the office to pick up his paycheck he found a termination notice in the pay envelope.

The General Counsel alleges that as part of the campaign against the Union, and after the fact at an annual employee meeting held December 23, Delmas and R.J. Conley made a number of unlawful threats and statements violative of Section 8(a)(1) of the Act. General Counsel also alleges that Gilbert was unlawfully discharged in retaliation for his union activity and to discourage such activity among the employees, in violation of Section 8(a) (1) and (3).

In support of its case, General Counsel called Delmas and R.J. Conley as witnesses pursuant to Federal Rule of Evidence (FRE) 611(c). They denied most of the allegations but made a few admissions as discussed below. General Counsel also called Tim Gilbert, but his testimony was limited: he went to a union meeting on a Sunday and was discharged without warning the following Friday. He knows he was discharged after he went to a union meeting but he could not personally further add to General Counsel's theory of the case.

The main witness for General Counsel—or at least the individual anticipated to be the main witness—was Jeremy Thompson, a truckdriver who works for Conley Trucking. Thompson had supplied counsel for the General Counsel with two sworn pretrial affidavits (GC Exhs. 17, 18) that provided ample support for the issuance of the complaint in this case. However, at trial, Thompson recanted his affidavits. Because Thompson's testimony and the appropriate evidentiary use of his affidavits have important implications for this case, at the outset I consider his testimony and the evidentiary significance of his affidavits.

B. The Testimony and Affidavits of Jeremy Thompson

As mentioned, prior to the trial in this case, Thompson gave two sworn affidavits to the Board's Regional Office that laid out in detail, with exculpatory statements alongside incriminating testimony, an account of Respondent's statements and actions regarding the possibility of the facility's unionization. However, at trial, Thompson denied every material factual assertion in his affidavits that could possibly harm Respondent's legal position or cast Respondent in a bad light. These denials were not convincing. Over the course of his testimony, Thompson rejected the claims in his affidavit by declaring repeatedly, and often inconsistently, regarding the same incident that he could not remember the incident described in his affidavit, that the incident did not happen, that the incident happened but the statements attributed to Respondent's agents in the affidavit were made by the Union or by truckdrivers whose names he could not recall. He testified that he did not tell the Board agent taking his affidavits the statements in his affidavits; he testified that he could not remember making the statements, and he testified that he did make the statements but he lied and made the statements because he was angry at the Union's failure to organize the employees. He also testified that he may or may not have made the statements, but he couldn't remember because he was intoxicated and/or under the influence of prescription narcotics at the time he gave the affidavits, and he claimed that he exaggerated in his affidavits because of the narcotics and alcohol. Thompson testified that he could not remember how many affidavits he had provided to the Board. He first denied meeting with the Conley's about the upcoming trial but then admitted that he met with R.J. Conley prior to the trial. He also met with the R.J. and Delmas Conley and Respondent's counsel and discussed the contents of the affidavits he provided to the Board, an event confirmed by the Conleys and by Respondent's counsel. At this meeting, Respondent's counsel took his own statement from Thompson, with R.J. Conley present, on April 24, 2 days before the trial.[3] Although he admitted to signing, initialing in various places and reading "parts" of his affidavits, according to Thompson, when his wife read the statements to him, he understood for the first time what was in the statements. He did not say when she read them to him but they enabled him to have a clear recollection of their contents when he met with the Conley's and their counsel two days before the trial during he which he disclosed to them the contents of the affidavits. A few days later, at trial, his recall of the contents of the affidavits became very unreliable and uncertain.

As to testimony on events that did not involve statements probative of Respondent's involvement in antiunion activities Thompson's memory was reasonable, but when asked about anything that could possibly implicate Respondent, his memory left him and he answered with a litany of vague and often inconsistent claims that he didn't say it, couldn't remember, said it but had lied, etc. His demeanor brightened only when Respondent's counsel examined him, at which time his recall improved dramatically, and he crisply and firmly denied (with-

[2] All dates are in 2005 unless otherwise indicated.

[3] That document was offered for identification, described, and used to refresh Thompson's memory (Tr. 253–254, 263), and copies distributed to the parties, but once Thompson testified that he could not read Respondent chose not to introduce it into evidence.

out resorting to claims of loss of memory) every allegation that Respondent's counsel led him through. (See Tr. 255–257.)

Except when questioned by Respondent counsel, Thompson gave his testimony in a robotic, mechanistic monotone, hunched over the witness table, answering questions without motion, looking neither right nor left, staring ahead. He refused to even glance at his affidavit and declared that he was illiterate and could not read the affidavits. What stood out in my mind was the lack of effort to even pretend that that he believed his own testimony. The impression created was that Thompson came to the trial with an ugly job to do, and he did it, but he did it coldly, without conviction or feeling, and without an effort to pretend that he was doing anything other than getting through an ordeal that for reasons unknown he had decided he had to undertake. It was a sad spectacle. One cannot help but wonder about the pressures that could prompt such a display. His testimony is not credited.[4]

Convinced, as I am, that Thompson's testimony at the hearing was thoroughly untruthful, I must consider whether, as urged by General Counsel, to rely on his pretrial affidavits as substantive evidence. At the hearing, Thompson's affidavits were placed in evidence (GC Exhs. 17 and 18) for purposes of impeachment without objection from Respondent. However, Respondent objected to the use of the affidavits as substantive evidence and I reserved ruling and asked the parties to brief the issue.

A review of Board precedent demonstrates that there is, in fact, no doubt that I have authority to accept the affidavits as substantive evidence and to credit their assertions over testimony presented at the hearing. *Santa Maria El Mirador*, 340 NLRB 715, 721 (2003); *Bay Refrigeration Corp.*, 322 NLRB 1045, 1049–1053 (1997); *Planned Building Services*, 318 NLRB 1049, 1057 (1995); *Be-Lo Stores*, 318 NLRB 1 (1995), enfd. in relevant part 126 F.3d 268 (4th Cir. 1997); *Fun Connection & Juice Time*, 302 NLRB 740, 748 (1991); *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979); *Snaider Syrup Corp.*, 220 NLRB 238 fn. 1 (1975); and *Starlite Mfg. Co.*, 172 NLRB 68, 72 (1968).[5]

Generally, the Board has held that hearsay evidence is admissible if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994), quoting *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980). In *Alvin J. Bart & Co.*, supra, the Board specifically considered in some depth and rejected the proposition that substantive admission of pretrial affidavits must be denied on grounds of hearsay. In *Alvin J. Bart & Co.*, the Board pointed out that "we would be reluctant to adopt a rule [as urged by the respondent and the dissenting Board member] which mechanically excludes evidence, regardless of its intrinsic reliability, because it is technically hearsay. Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent qualities justifies." 236 NLRB at 242. In this regard the Board cited to Section 10(b) of the Act, which provides that Board proceedings are to hew to the Federal Rules of Evidence (FRE) "so far as practicable." The Board reviewed this equivocal language in light of Senator Taft's supplementary analysis of the 1947 legislation that added Section 10(b) to the Wagner Act. Senator Taft explained that "the phrase 'so far as practicable' in Section 10(b) 'gives to the trial examiner *considerable discretion* as to how closely he will apply the rules of evidence' . . . and, accordingly, it has been generally recognized that the Board is not bound to follow the strict rules of evidence applicable in the Federal Courts." *Alvin J. Bart & Co.*, supra, quoting, 93 Cong. Rec. 7002 (1947); reprinted in the Legislative History of the National Labor Relations Act II at 1560 (1947) (Board's emphasis). The Board in *Alvin J. Bart & Co.*, went on to suggest that sworn pretrial affidavits may fall within the exception to the hearsay rule found in FRE 801(d)(1)(A) where the witness appears in court and is subject to cross-examination about his pretrial statement.[6] In this regard the Board noted the "modern trend" toward viewing prior inconsistent statements as substantive evidence and not as hearsay, and the "intermediate" view adopted in the then recent 1975 adoption of the FRE that excluded from the definition of hearsay certain sworn prior inconsistent statements such as depositions. As the Board in *Alvin J. Bart & Co.*, supra at 243 explained,

> If sworn statements to the Board agent are regarded as depositions, they are not hearsay under the Federal Rules. And there is good reason to treat them as such because there is no requirement under the Federal Rules that the prior statement embodied in a deposition be subject to cross-examination when made. If the sworn statements are not deemed to be depositions, the distinction is indeed a fine one entitled to little consideration in an administrative proceeding where there is discretion to receive in evidence and rely on hearsay as substantive evidence.

In other words, according to the Board in *Alvin J. Bart & Co.*, even assuming that a pretrial affidavit does not, strictly speaking, fit within FRE 801(d)(1)(A), it is close enough for a regime that follows the FRE "so far as practical" that it should not be rigidly excluded from consideration as substantive evidence.

I would add that, while mindful that Board proceedings are to follow the FRE "so far as practical," in my view federal labor policy concerns would render decidedly impractical adherence to an evidentiary rule that precluded the administrative

[4] I note that Thompson's demeanor and testimony were such that I am sure that even in the absence of his prior inconsistent statements his testimony would not be credited.

[5] See also *Salem Leasing Corp.*, 271 NLRB 86, 88–90 (1984). Although the Board in *Salem Leasing* adopted the judge's conclusions without relying (as the judge had) on the credited statement in the witness's pretrial affidavit, Judge Bernard Ries' thoughtful discussion of the issue is instructive.

[6] Rule 801(d)(1)(A) provides that a prior statement of a witness is not hearsay if,

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

law judge from having discretion to substantively consider these pretrial affidavits.

One of the chief concerns that motivated the modern trend to allow the substantive use of some prior witness statements, as reflected in FRE 801(d), was concern about witness intimidation—i.e., witnesses who could be intimidated or were otherwise vulnerable to pressure with the result that their prior statements were a more reliable guide to the factfinder than their testimony in the courtroom. According to the Congressional subcommittee considering enactment of the rules of evidence proposed by the Supreme Court, support for the Supreme Court's proposal to permit an even broader substantive use of prior inconsistent statements than Congress ultimately adopted in the FRE was "based largely on the need to counteract the effect of witness intimidation." H.R. Comm. Print at 26–27 (June 28, 1973), included in the Hearings on Proposed Rules of Evidence before the H.R. Subcomm. on Criminal Justice of the Comm. on the Judiciary, 93rd Cong. (1973), at 170–171, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7086–7087. The Notes of the Advisory Committee reviewing the rules of evidence proposed by the Supreme Court opined that the Court's proposed Federal Rules of Evidence Rule 801(d)(1)(A) "provides a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case" (quoting with approval the California Law Revision Comments to Cal. Evid. Code § 1235, which permits substantive use of prior inconsistent statements). See also Sen. Rept. 93—1277 at 16 (October 18, 1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062 (with amendments to FRE 801 a "realistic method is provided for dealing with the turncoat witness who changes his story on the stand").

This problem of witness intimidation has long been a particular concern for the Board and has shaped Board practice and policy. Indeed, it is precisely the concern with the potential for "witness intimidation" and the "peculiar character of labor litigation" in which "the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment," that undergirded the Supreme Court's holding in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (internal quotations omitted). In *Robbins Tire,* the Court recognized that the Board's concern over the potential for witness intimidation in Board litigation made it critical to avoid pretrial discovery in Board proceedings and the Court held that Exemption 7(A) of the Freedom of Information Act (FOIA)—the exemption from disclosure of investigatory records that would "interfere with enforcement proceedings"—barred the effort of an employer to use FOIA obtain pretrial affidavits before a witness testifies:

> The most obvious risk of "interference" with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. This special danger flowing from prehearing discovery in NLRB proceedings has been recognized by the courts for many years.
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> . . . .
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> The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the "peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976). Accord: *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977). While the risk of intimidation (at least from employers) may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony.
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> Furthermore, both employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated. Such reluctance may flow less from a witness' desire to maintain complete confidentiality—the concern of Exemption 7(D)—than from an all too familiar unwillingness to "get too involved" unless absolutely necessary. Since the vast majority of the Board's unfair labor practice proceedings are resolved short of hearing, without any need to disclose witness statements, those currently giving statements to Board investigators can have some assurance that in most instances their statements will not be made public (at least until after the investigation and any adjudication is complete). The possibility that a FOIA-induced change in the Board's prehearing discovery rules will have a chilling effect on the Board's sources cannot be ignored.
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> In short, prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an "interference" with NLRB enforcement proceedings: that of giving a party litigant earlier and greater access to the Board's case than he would otherwise have. As the lower courts have noted, even without intimidation or harassment a suspected violator with advance access to the Board's case could "construct defenses which would permit violations to go unremedied." *New England Medical Center Hospital v. NLRB*, 548 F.2d 377 (1st Cir. 1976), quoting *Title Guarantee Co. v. NLRB*, 534 F.2d at 491.[7]

The Supreme Court in *Robbins Tire* could not have taken more seriously the concern that intimidated employee witnesses might skew or undermine completely the effective administra-

[7] 434 U.S. at 239–241 (footnotes omitted) (court's bracketing).

tion of Federal labor policy. Accordingly, the Court endorsed the Board's effort to shape its trial practice and procedures to address the problem posed by the potential for witness intimidation. As pointed out in *Robbins Tire*, in Board litigation the concern is real that, even in the absence of employer misconduct, an employee fearing the inherent power of the employer will take it into his own hands to color or recant his testimony, especially when faced with the prospect of actually testifying, which, as the Supreme Court recognized, the employee may have reasonably considered an unlikely eventuality. Thus, the concern with witness intimidation that prompted the modern movement toward permitting the substantive use of some prior inconsistent statements in Federal court is even more acute in the arena of Board litigation. It is precisely because of the "peculiar character of labor litigation" with its reliance on witnesses "especially likely to be inhibited by fear" that, as a matter of effectuating Federal labor policy, administrative law judges should have the discretion to consider sworn pretrial affidavits as substantive evidence. For when a witness testifies in marked contradiction to his pretrial statement, and particularly where in the opinion of the administrative law judge that testimony reeks of untruthfulness, and further, where, as here, the employer has met with and discussed the contents of the employee's pretrial statements with the employee, the ability of the judge to consider substantively the witnesses pretrial statements becomes an important tool in the search for truth and an antidote to the threat to Board enforcement proceedings posed by witness intimidation.[8]

In this instance, the circumstances convince me that Thompson's sworn affidavits should be considered for the truth of the matters asserted therein. As discussed below, I do not credit the affidavits in their entirety. But it would be a mistake to confuse admissibility with sufficiency of the evidence and exclude the affidavits on such grounds. To admit the affidavits as substantive evidence does not mean that they must be credited over all (or any) other evidence. But, part of his incredible testimony—in many ways its essence—was Thompson's entirely unconvincing account of why his affidavits were false. None of his lamentations bore the slightest indicia of trustworthiness. On the other hand, he admits he gave the affidavits, swore to them and signed his name and even initialed significant corrections. Each affidavit concludes just prior to signature:

> I have read this statement consisting of [the applicable number of] pages, including this page, I fully understand its contents, and I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.

Also of significance is the fact that the affidavits are not tendentious documents and even contain assertions that paint the Conley's in a positive light in certain instances. In sum, though out-of-court statements, the affidavits on their face suffer from none of the affirmative lack of credibility exhibited by Thompson's in-court statements. Based on my observation of Thompson at the hearing, his demeanor convinces me of the very opposite of the design of his testimony: it convinces me that his affidavits are more trustworthy than his testimony at the hearing, and that his testimony at the trial, in fact, was part of an effort to avoid the impact on Respondent that he knew would result if he repeated the statements in his affidavits at trial and was believed. Although Thompson attributed the insight to Gilbert, I think Thompson also understood "that I couldn't change my statements or he [Gilbert] would lose." (Tr. 264.) Indeed, there is a very real sense in which Thompson's completely incredible testimony and untrustworthy demeanor at the hearing, including his testimony as to the invalidity of the affidavits, helps to bolster the credibility of the affidavits.[9] In this case, the Board's policy permitting the use of pretrial affidavits as substantive evidence in lieu of false and contrary testimony is appropriately invoked.

C. Use of the Affidavits and Some General Observations on Credibility

Accepting Thompson's affidavits as substantive evidence is not tantamount to crediting the claims in the affidavits over all other evidence. Rather, accepting the affidavits as substantive evidence means that the assertions in the affidavits must be considered with and against the record evidence as a whole, including, in many cases, the denial of the allegations by witnesses aligned with Conley Trucking. This is a more difficult task than in the traditional case where two witnesses give conflicting live testimony on an issue. However, it is one that I must assume because, as discussed above, to ignore the pretrial statements would be inconsistent with the policies of the Act and would not serve the search for truth to which this tribunal is

[8] I note that Respondent counsel's pretrial meeting with Thompson, in which they discussed the contents of Thompson's Board affidavits (Tr. 252), was violative of the Act under *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964). In that case, the Board held that "interrogation concerning statements or affidavits given to a Board agent" is "outside the ambit of privilege" available to employers who, with appropriate safeguards, may interview employees to prepare for an unfair labor practice trial. This issue was not alleged in the complaint or otherwise advanced by General Counsel. Accordingly, I decline to find a violation, however, it is a further factor undermining the credibility of Thompson's testimony and the recantation of his affidavits.

[9] "[T]he the demeanor of a witness' . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *NLRB v. Walton Mfg.*, 369 U.S. 404, 408 (1962) (quoting, *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d. Cir. 1952)). Judge Learned Hand authored the opinion in *Dyer v. MacDougall*, as he did the opinion in *DiCarlo v. U.S.*, 6 F.2d 364, 368 (2d. Cir. 1925), cert. denied 268 U.S. 706 (1925), in which he explained that a jury may be convinced by a witness' testimony that the testimony is false and earlier inconsistent statements true:

> The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

committed. At the same time, I recognize that Thompson's commitment to not testifying truthfully—and his testimony really amounted to that—limited the ability to meaningfully exam him regarding the allegations in the affidavits (or anything else). In these unique circumstances this is an instance where I conclude that the typical procedure of viewing conflicting evidence and crediting one witness or another is not entirely satisfactory. In *National Telephone Directory Corp.*, 319 NLRB 420, 422 (1995), the Board confronted a somewhat similar problem when for policy reasons it refused to permit cross-examination of a witness regarding certain union organizational activities. In a holding that is instructive for the situation we face here, the Board explained,

> We recognize, however, that our ruling leaves open the remote possibility that the General Counsel's evidence could consist primarily of testimony immune from cross-examination. In such rare circumstances, it could be appropriate—in resolving issues of credibility—to forego the traditional credibility analysis and afford less weight to the immune testimony in determining whether a preponderance of evidence supports the General Counsel's allegations. Such an analysis would decrease the likelihood that the immune testimony would constitute the sole basis for finding that a preponderance of evidence supports the General Counsel's allegations.

Although the circumstances are somewhat different—here the "immunity" from cross-examination is a product of the witness' recalcitrance not an evidentiary privilege—in this case as in *National Telephone*, supra, the parties confronts a situation where General Counsel's evidence (the witness statements) is insulated from effective cross-examination. The fact that in this case the disadvantage to Respondent stems from the unbelievability of a witness seemingly committed to advancing Respondent's interests is ironic, but beside the point. Consistent with the Board's approach in *National Telephone Directory* I will "afford less weight" to the pretrial affidavits "in determining whether a preponderance of the evidence supports the General Counsel's allegations." Where an allegation in the complaint is supported *solely* by a statement in Thompson's affidavit, and the record is devoid of *any* corroboration that supports the likelihood of the truth of the statement, then I have determined that allegation fails due to a lack of sufficient evidence, without regard to credibility resolutions. See *National Telephone Directory Corp.*, supra, citing *Blue Flash Express*, 109 NLRB 591, 592 (1954) ("When, as in this case, the Trial Examiner is not persuaded by the testimony of the General Counsel's witnesses that threats and promises were made to them by the Respondent, the General Counsel has failed to meet that burden of proof"). Where there is some form of corroboration then I will consider whether to credit or discredit the various competing testimony as is the traditional practice. Although the extra "burden" this places on the General Counsel may not be warranted in every case where pretrial statements are considered substantively, in this case I believe that it provides an important brake on the use of Thompson's pretrial statements as a sole source of support for a finding of a violation of the Act by Respondent.[10]

Generally speaking, Thompson's affidavits describe numerous statements by R.J. and Delmas Conley that General Counsel alleges to be unlawful. The affidavits paint a picture of an employer actively (and often unlawfully) opposing the union campaign, something the Conley's deny. With the exception of the allegations admitted to by Respondent (discussed below), the general theme of R.J. and Delmas Conley in their testimony was to deny all wrongdoing alleged. They denied knowing about the union campaign prior to learning on October 28 from radio broadcasts that the Teamsters were seeking to organize the facility. They denied making most of the comments alleged by General Counsel to be unlawful. They denied any unlawful motive for terminating Gilbert. I found R.J and Delmas Conley to be reasonably straightforward in their demeanor. Yet notwithstanding this, there was vagueness to their testimony in many instances, and some telling contradictions that lead me not to believe all of their testimony.[11]

Finally, I found Gilbert generally to be a credible witness. He did not exaggerate what he knew, he did not attempt to deny or minimize the mishaps and misconduct that marked his tenure at Conley Trucking. He did not exhibit bias by attempting to impugn others. I think he testified honestly and in general, I have credited his testimony.[12]

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[10] It is also an approach consistent with the Board's willingness admit hearsay evidence that is otherwise corroborated and probative. *Dauman Pallet, Inc.*, 314 NLRB at 186.

[11] R.J. Conley claimed that Conley Trucking did not "fight" the Union and that it was the employees' choice whether they chose a union. Indeed, Thompson's affidavits quoted Delmas stating this (and Thompson testified to this as well, it was one of the few items from the affidavit that Thompson recalled and affirmed). Yet, the record shows that the Conleys did "fight" the Union. Respondent distributed antiunion literature that was fairly pointed in explaining the Employer's right to permanently replace during an economic strike and other legal realities. Of course, the literature and antiunion campaign is not alleged to be unlawful, and, if properly conducted within the bounds of the law it is an employer's prerogative to "fight" unionization. But the Conley's worked hard at the hearing to strike a pose of indifference, or at least nonchalance, towards the union drive that is not borne out by the record. It is also notable that while Delmas Conley testified that he learned about the Union's presence for the first time on October 28, R.J. testified that he told his father about the union leaflets in the parking lot in June or July. Finally, while Delmas testified that he did not mention the Union at all when he addressed the assembled employees on December 23, R. J. confirmed that he did, in several comments that are alleged to be unlawful. In sum, R. J. and Delmas went to some lengths on the witness stand to conceal and falsely deny their opposition to the Union, and the lack of candor bears on their credibility.

[12] I specifically discredit, for the same reasons I discredited Thompson generally, the suggestion in Thompson's testimony that Gilbert attempted to influence him to provide favorable testimony, something that Thompson denied until Respondent's counsel was able to "refresh" his recollection with the statement that counsel took from Thompson when Thompson met with management about this case. I also do not credit—for the truth of the matter asserted—Delmas Conley's testimony that in the weeks before trial, Thompson told Conley that Gilbert had offered Thompson money to "help him out" at the trial. Thompson, who seemed willing to say almost anything to help Respondent,

D. Discussion and Analysis

1. The independent 8(a)(1) violations

Section 7 of the Act grants employees, among other rights, "the right to self-organization, to form, join, or assist labor organizations." Pursuant to Section 8(a)(1) of the Act, it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In this case, the General Counsel alleges that Respondent committed a number of independent violations of the Act, as set forth in the complaint at paragraphs 5(a)–(d) and 6(a)–(f). I consider each in turn.

a. Paragraphs 5(a)–(d)

In paragraphs 5(a)–(d), the General Counsel alleges that a variety of conduct by R.J. Conley violated the Act.

(1) Paragraph 5(a)

The General Counsel alleges that R.J. Conley unlawfully "created the impression of surveillance of employees' union activity by telling employees that he heard that certain employees were trying to bring in a union."

As discussed, above, Gilbert testified that he attended two union meetings, one before and one after he was fired. The first was a union meeting at a Wendy's restaurant in Lucasville on Sunday, October 23, that was also attended by employees Delabar, Thunderdance, Carver, Rosenogle, and Thompson. Thompson also testified about this union meeting. It was his second, the first having been held some weeks earlier and attended by himself, Thunderdance, Carver, and Rosenogle.

In support of this allegation of the complaint, General Counsel relies on the statement in Thompson's November 16 sworn affidavit (GC Exh. 18), in which Thompson stated:

> [T]he following Wednesday, I was at the office at Conley. There were 3 or 4 other drivers standing around that I don't normally talk to. I don't know their names. It was about 4:30 or 5:00 p.m. R.J. Conley came over. We talked about everyday business. Conley then said "I heard something today." I said, "What's that?" He said, "I heard you, Tim Gilbert, and Steve Del[a]bar were trying to get a union in here." I said Del[a]bar and Gilbert had nothing to do with it. That was the end of the conversation.

R.J. Conley denied ever having told any employees that he heard they were trying to bring a union in.

In this instance, Thompson's statements are buttressed by the specific corroboration of this aspect of Thompson's statement provided by Teamster Organizer Rick Kepler. Kepler testified that Jeremy Thompson had been his "key contact" in the failed effort to organize Respondent. With regard to this allegation of the complaint, Kepler quoted Thompson telling him specifically what R.J. had said to him. According to Kepler, Thompson told him that R.J. Conley approached Thompson and identified Thompson, Delabar, and Gilbert as being involved in the Union. As to this exchange, Kepler testified to what Thompson told him: "[H]e said it was R.J. He goes we know—here are his [Thompson's] words to me during the conversation. 'We know it was you Jeremy and Delabar and Gilbert who started this thing.'"

Kepler testified that "this was before Gilbert was fired," something he was sure of because Thompson immediately called Kepler when Gilbert was fired, to which Kepler responded, "[T]hey got the wrong guy," as Gilbert was not part of the organizing team but had merely attended a union meeting.

I credit Kepler's testimony that Thompson contemporaneously told him about this incident. His account is specific, and similar to the account of the incident in Thompson's November 16 affidavit. Throughout his testimony, I found Kepler a very credible witness, both in demeanor and in his tendency not to overstate his testimony and not to hesitate to offer testimony that aided the other side. I think his very specific corroboration of this incident was credible.[13]

Kepler's testimony adds weight to Thompson's statement. It demonstrates that prior to any litigation, prior to any affidavits, this incident was reported by Thompson in a manner consistent with his subsequent statement. I credit Thompson's statement on this point over R.J. Conley's denial. As noted, above, the Conley's claims that they did not "fight" the union drive were plainly false and lend an air of doubt to R.J. Conley's pronouncements at trial of total ignorance about the presence of the Union, even after he admitted he knew that union leaflets were distributed in the parking lot in June or July. I find that R.J. Conley told Thompson that he heard that Gilbert, Thompson and Delabar were trying to bring a union to Conley Trucking.

The Board considers employer conduct that creates an impression of surveillance to be a violation of Section 8(a)(1) of the Act. Employees should not have to fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000). In *Sam's Club*, 342 NLRB 620 (2004), the Board held that:

> The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. The Board does not require that an employer's words to an

did not testify to this. Whether or not Thompson told Conley this, I find that Gilbert did not say it.

[13] Respondent objected to all of Kepler's testimony, but I overruled the objections. Contrary to Respondent's objections, his testimony was not hearsay, as it was not offered or considered for the truth of the matters asserted by Thompson in his conversations with Kepler. Under the circumstances of this case, however, Kepler's testimony plays an important role in providing for impeachment of Thompson's testimony and corroboration of certain statements in his affidavits such as that discussed in the text here. Respondent also objected to Kepler's testimony on grounds that he had not been sequestered. However, at the commencement of the hearing I permitted him to remain in the hearing room as Charging Party's representative. See *Greyhound Lines, Inc.*, 319 NLRB 554 (1995). See also FRE 615. In assessing Kepler's credibility, I have, of course, considered the fact that he was present for other witnesses' testimony (as was R.J. Conley, the representative of Respondent).

> employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means.[14]

In *Sam's Club*, supra, a supervisor was found to have created an impression of surveillance when he told an employee that he had heard the employee was circulating a petition about wages. The Board held that such a statement "leads reasonably to the conclusion that the Respondent has been monitoring [the employee's] activities." 342 NLRB at 620–621. In drawing this conclusion, the Board relied on the fact that the employee had not circulated the petition openly and the supervisor did not reveal the manner in which he had learned the information about the employee's activities. In this instance, Thompson reasonably could conclude from Conley's statement—that Conley had heard that Gilbert, Delabar, and Thompson "were trying to get a union in here"—that the employees' protected activities were being monitored. Conley did not explain how he had learned this information and certainly, nothing in his statement or conduct suggested that the information was lawfully acquired.[15] To the contrary, by communicating not only his knowledge of the existence of the union drive but also by listing the specific employees (he believed to be) leading the campaign, Conley added to the impression that he was keeping tabs on the details of the employees' protected activity.[16] Of course, it would not be (and, in fact, was not) lost on Thompson that each employee identified by Conley had been at the union meeting held 3 days earlier. Thus, whether or not Conley was correct about who was spearheading the union drive, his comment demonstrated enough familiarity with the employees' actual and recent protected activities to add substantially to an impression of monitoring. As in *Sam's Club*, supra, it is significant that at the time of Conley's comment the union organizing campaign and Thompson's (not to mention Gilbert's) role in it was not in the open. Indeed, the Conley's deny having any knowledge of the union campaign at this time, something I do not believe, but a contention that is premised on the fact that the campaign was not in the open. Thus, Conley's detailed comment was not based on information readily available to the employer, adding further to the impression of monitoring. In this regard, a distinction can be drawn here from the circumstances prevailing in *SKD Jonesville Division L.P.*, 340 NLRB 101 (2003), where a manager's comment to an open union supporter that he had "heard that the employees wanted you to organize a union," was held not to have created an impression of surveillance. Unlike the instant case, the comment in *SKD* was addressed to an open union supporter, did not evince knowledge regarding the identity of campaign supporters, and was not timed in a way that suggested knowledge of a recent union meeting. On the other hand, Conley's comment demonstrated detailed knowledge of union activity never openly disclosed. Conley created the impression of surveillance and therefore violated Section. 8(a)(1) of the Act.[17]

(2) Paragraph 5(b)

In paragraph 5(b) of the complaint, the General Counsel alleges that in early November, R.J. Conley told employees that Respondent could sell its trucks if employees chose to unionize.

Conley denies ever making such a comment to employees. Thompson's affidavit, sworn to on November 16, describes the incident as follows:

> About one week to 1.5 weeks after Gilbert was fired, I was at the shop. About 4 or 5 other drivers were there. Roger Rosenogle was there. Dave Jordan, a mechanic was there. The others I am not sure of. It was after work at 5 or 5:30 p.m. R.J. Conley told us he couldn't talk about it but he can legally say that he can sell his trucks if he so chooses. He said he can't afford to pay the big wage that the Union promising us. He said his company didn't generate that kind of money. He said that if they could get a Union in there and it would benefit the guys, they would gladly do it but they couldn't afford it. I think R.J. started talking after one of the employees asked him about it. He said if we wanted a Union it would be our choice and we could vote on it and he didn't have any say in it. We didn't reply to this.

In this case, corroboration of Thompson's statement is vague. Kepler described that when he talked with Thompson he heard that" they were talking about threatening to shut the place down if the Union comes in; they would sell the trucks if the Union come in . . . if they find out who started this Union or who's involved with the Union, they're not going to be working at Conley any more." When asked whether Thompson specified who made these statements, Kepler suggested that Jeremy

[14] 342 NLRB at 620, citing *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998).

[15] *Classic Sofa, Inc.*, 346 NLRB 219, 221 fn. 10 2006), and surrounding text.

[16] *Donaldson Bros. Ready-Mix, Inc.*, 341 NLRB 958, 963 (2004) (specifically identifying union leaders including employee to whom the comment was addressed "gave [the employee] reasonable grounds to believe that management knew [the employee] and others were union organizers and that it had a source of information regarding the employees' union activities"); *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996) ("[t]he Board has long held that, when, in comments to its employees, an employer specifically names other employees as having started a union movement or as being among the union leaders, the employer unlawfully creates the impression, in the minds of its employees, that he has been engaged in surveillance of his employees' union activities"), enfd. mem. 1998 U.S. App.. LEXIS 3204; *Jordan Marsh Stores Corp.*, 317 NLRB 460, 465 (1995) (manager's statement that he knew there were 12 to 15 employees at the Union meeting unlawfully created impression of surveillance).

[17] In assessing whether Thompson reasonably could conclude from Conley's statement that the employees' activities were being monitored it is irrelevant that, according to Kepler, Thompson suspected that "it was Delabar who got scared and went and told the bosses who was at the meeting." It is not surprising that Conley's comments operated to create suspicion among the ranks of union supporters. It is also irrelevant that Thompson apparently believed that the first union meeting was, in fact, monitored by a member of the Conley family (GC Exh. 18 at 4, ll 8–16). The issue is not the *subjective* belief of an employee regarding the employer's surveillance activity, rather, an *objective* test of whether the employee reasonably could conclude from the statement in question that protected activities are being monitored. *Michigan Roads Maintenance Co., LLC*, 344 NLRB 617, 617 fn. 4 (2005) (employee's subjective belief that employer is surveilling union activity is not a basis for concluding that employee reasonably could have drawn that conclusion based on employer's statement).

mostly said that it was R.J. who was on, his words, a rampage to find out what was going on, who started it, and most of the threats." The difficulty with this is that, regardless of whether individual comments by R.J. Conley violated the Act as alleged, and should not have been made, Thompson's account of the incident, and indeed, both his affidavits, do not square with a picture of R.J. Conley on "a rampage." There is, in fact, no claim in Thompson's affidavit that R.J. Conley threatened to shut down the facility if the Union came in, or threatened that "if they find out who started this Union or who's involved with the Union, they're not going to be working at Conley any more." In addition Kepler, who was a very credible witness, described the threats he was hearing about from Thompson as "[t]he basic threats I usually hear during an organizing drive" and pointed out that he "probably, at that time, I had like six other organizing campaigns going on." In other words, Kepler's recollection of the details of what Thompson told him on this score was not distinct in his memory from the complaints of employer threats he was hearing from organizers involved in the six other campaigns Kepler was overseeing at the time.

Absent corroboration or any other evidence supporting the specific incident described in Thompson's statement, I am unwilling to credit the statement in Thompson's affidavit. I note that none of the other participants in this conversation named in Thompson's statement testified. Given the parameters on the substantive use of Thompson's affidavits, discussed supra, my primary finding is that evidence in support of the allegation is simply insufficient for me to conclude that General Counsel has proven the allegation by a preponderance of the evidence. However, if I were to make credibility findings on the facts relating to this allegation I would credit R.J. Conley's denial that this specific statement was made. I recommend dismissal of this allegation of the complaint.[18]

(3) Paragraph 5(c)

In paragraph 5(c) of the complaint, General Counsel alleges that in early November, R.J. Conley told employees that if they chose to unionize, Conley would change its method of pay resulting in a pay decrease.

The evidence for this allegation is found in Thompson's November 16 affidavit. There he stated, "I recall that R.J. said we would make $7–8 per hour if the Union came in because they went in the hole last year with fuel costs being high." R.J. Conley denies this, and testified that he never said that he would change the pay or decrease the pay received by truckdrivers (who are not paid on an hourly basis). There is no corroboration in Kepler's testimony (or any other evidence) in support of this allegation. As the truckdrivers have never been paid on an hourly basis, it is an odd threat to make.

My primary finding is that evidence in support of the allegation is insufficient for me to conclude that General Counsel has proven the allegation by a preponderance of the evidence. However, if I were to make credibility findings on the facts relating to this allegation I would credit R.J. Conley's denial that he made this statement. I recommend that this allegation of the complaint be dismissed.

(4) Paragraph 5(d)

In paragraph 5(d) of the complaint, General Counsel alleges that on or about November 3, R.J. Conley told employees that if they selected union representation they would be at zero and would start at that point.

The evidence to support this allegation is found in the testimony of R.J. Conley. He testified that around mid-November he was fueling a truck when employee Ata Thunderdance pulled in behind him. Conley did not recall which of them initiated conversation,[19] but at some point Thunderdance told Conley he wanted to know what the union could do for him. Conley agreed that he told Thunderdance that in negotiations with the Union "we start from zero and have to bargain everything." Conley also said that "you have to bargain everything" and that "Delmas Conley has the final say." R.J. Conley admitted that he made these some statements to other employees too.[20]

As the Board explained in *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003), enfd. in relevant part 400 F.2d. 920 (D.C. Cir. 2005):

> It is well settled that employer statements to employees during an organizing campaign that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s]" which carry within them "he seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Economy Fire & Casualty Co.*, 264 NLRB 16, 21 (1982), quoting *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977). Although such statements are not per se unlawful, the Board will examine them, in context, to determine whether they "effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore," or–conversely—whether they indicate that any " reduction in wages or benefits will occur only as a result of the normal

[18] The fact that I am willing to credit some of Thompson's statements, and some of Conley's testimony, but not all, is not unusual. It is long settled that "[i]t is no reason to refuse to accept everything a witness says, because you don't believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951); *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

[19] Under questioning by counsel for General Counsel, Conley testified that he could not remember who initiated this conversation. Later, under leading questioning from Respondent's counsel, Conley suggested that Thunderdance had been the one to initiate the conversation about the Union. I do not credit the latter explanation.

[20] At trial, Conley also testified that he began his conversation with Thunderdance by saying, "[Y]ou'll have your negotiator and we'll have our negotiator and we'll start bargaining for a contract." General Counsel contends on brief that this portion of Conley's statement should not be credited, as it was not mentioned in his pretrial affidavit account of this incident. I do think the newfound recollection is suspicious, and represents an effort to broaden and contextualize in Respondent's favor the comments that followed. I do not credit it. But I note that, even if it were part of the conversation, it would not change my findings with regard to this allegation.

> give and take of collective bargaining." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). See also *Capitol EMI Music*, 311 NLRB 997, 1007–1008 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

In this case, contextualizing and appended to Conley's admitted comment that "we start from zero" is the added notice" and we have to bargain everything." The Board-recognized "danger" in the bare statement that the parties start at "zero" is thus intensified as it suggests that "everything" begins at "zero." It adds to the "impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore." Of course, the unlawful threat is still implicit—a claim can be made that what Conley meant was nothing more than a promise to bargain all issues with no preconceptions—but, as the Board explained in *Federated*, supra at 256 fn. 4, "[i]n our view, 'start from zero' means what it says, and the Respondent's employees could reasonably assume as much." If you "start from zero" and "have to bargain everything" it would only be reasonable to assume that the outcome of bargaining "depends in large measure upon what the Union can induce the employer to restore." Notably, Conley's comments contained no explanation of the give-and-take of bargaining. To the contrary, Conley added the statement that "Delmas Conley has the final say," concept of his authority and the process of bargaining inconsistent with the "normal give and take of collective bargaining." See *Economy Fire & Casualty Co.*, 264 NLRB 16, 21 (1982) (comment that bargaining would "start from zero" unlawful, in part, because comments also made that in bargaining benefits would be taken away "except those the Company's president decided to let them have"). Conley's comments did not include an explanation of the overall give-and-take of bargaining. Respondent points out (R. Br. at 11) that the "start at zero" comments were "tempered" by the written literature distributed by Respondent, which, in one instance (R. Exh. 9) explained that "[w]ages and benefits may be improved or reduced in the process of bargaining." Although agreeing that "the Board must consider the impact of particular employer statements in the context of surrounding circumstances, including the employer's other statements," in *Federated*, supra, the Board rejected the contention that other lawful statements or literature that fail to repudiate the coercive statements can "cure" the violation. The Board recognized that,

> [W]e must also consider the coercive impact, flagged by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), that a particular employer statement can have even when it is arguably mitigated by other employer statements made at different times or places. An employee might reasonably be influenced more by a coercive statement than by a different noncoercive statement, in order to avoid any adverse consequences.

Federated, supra at 256. In this case, the unlawful statements were made personally by R.J. Conley to employees. He is one of the top ranking management officials at this family owned and operated business (testimony indicated that Delmas was "stepping back" from active involvement in operations). The coercive impact of these statements cannot be undone by subsequent posted literature or mailings that do not mention the coercive statements but are simply a generic form of employer campaign literature. I find that in context Conley's statements about "start[ing] from zero" in bargaining violate Section 8(a)(1) of the Act as alleged in the complaint, except that the correct date on which the violation is occurred is mid-November.[21]

B. Paragraphs 6(a)–(f)

In paragraphs 6(a)–(f) of the complaint General Counsel alleges various threats by Delmas Conley. The threats are all very similar, the chief difference being the time when they are alleged to have occurred. Paragraphs 6(a), (d), (e), and (f) are alleged to have occurred between October 25 and early November. Paragraphs 6(b) and (c) concern statements alleged to have been made on December 23 at an annual pre-Christmas meeting of all employees conducted by Conley.

1. Paragraphs 6(a), (d), (e), and (f)

In paragraph 6(a) of the complaint, General Counsel alleges that on or about October 25, Delmas Conley told employees that he could sell the trucks or the business and/or close in case of unionization. In paragraphs 6(d), (e), and (f), General Counsel alleges that in late October or early November, Conley told an employee that he would close his business in case of unionization, that employees would lose their jobs unless they halted their efforts to unionize, and that if employees chose to unionize, Respondent would decrease employees' pay.

The evidence for these allegations is found in Thompson's April 13 affidavit. Thompson states:

> About late October or early November 2005, I was loading my work truck at the dock when Delmas Conley approached me. It was about 8:30 or 9:00 a.m. No one else was present, but Dan Conley was getting loaded in the general area. Conley told me that he wanted to have an "off the record" conversation about the Union. I told him that it would be off the record. Delmas asked me if I had a tape recorder on me and I opened my coat to show him that I did not. Delmas said that he would fight the Union and would shut the company down. He said that if we stopped right now, no one would lose their jobs, but if it didn't stop right now, we would all lose our jobs. Delmas said that he would shut the company down if we unionized. He said he would use scab labor. Delmas said that Thunderdance was retarded and that he tried to play the minority card with them, but it didn't work. Del-

[21] Respondent also defends Conley's remarks on grounds that there is no evidence that "these statements were delivered in anger, or were loud or threatening in any manner" and "that [t]here was no testimony that anyone understood them, or interpreted them, as a threat." (R. Br. at 7). However, in determining the coerciveness of a remark, the Board applies an objective standard of whether the remark reasonably tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Thus, evidence of the subjective reaction of employees to Conley's remark is irrelevant. That he did not raise his voice or speak loudly does not mitigate the coercive message, as discussed, supra.

> mas said that the Union was good years ago, but was not worth a f–k now. Delmas said that he could fire anyone he wanted and that he owned the company and could do anything he wanted anytime and that no one short of the President of the United States could tell him otherwise. Delmas said that if the Union won, he would bargain us down to minimum wage and lock us out and use scab labor. Delmas said that the Union had hurt Conley and had set him back 10 years. I did not previously tell the Board agent about this statement because I had assured Delmas our conversation would be off the record.

In his testimony, Delmas Conley offered no testimony on this specific conversation. More generally, he did deny ever saying that he would sell his trucks. He denied ever telling employees that they would lose their jobs unless they halted their efforts to unionize. He denied ever telling employees that if they choose to unionize he would decrease their pay. He denied ever asking any employee to have an off-the-record conversation.

On the one hand, Conley's general denials are undercut by the fact that—with regard to other incidents discussed below—the denials are contradicted by R.J. Conley (see infra). This leads me to question the credibility of Delmas Conley's testimony. However, Rick Kepler, who was in touch with Thompson "the entire time" that the Union was seeking to organize Conley Trucking did not corroborate this aspect of Thompson's testimony. In fact, according to Kepler (who, as discussed, supra, I found highly credible), Thompson identified R.J. Conley as the chief antagonist of the Union. Kepler testified that Thompson also identified Delmas Conley as being involved in making threats, but Kepler seemed to indicate that much of what Thompson knew about Delmas' antiunion conduct came from "the parking lot," presumably things that Thompson heard from other drivers. However, Thompson's statement is clear that only Thompson and Delmas were present for the incident alleged in paragraphs 6(a), (d), (e), and (f).

Of course, the lack of corroboration by Kepler may simply reflect the fact that Thompson honored Conley's request that the conversation be off the record and, in addition to not reporting the incident to the Board for nearly 5 months, also did not tell Kepler.

But, given the lack of any corroboration for this incident, at a time that Thompson was in regular communication with Kepler, and given the limited weight I am willing to ascribe to uncorroborated portions of Thompson's statement, I find the evidence insufficient to support a finding of a violation for these allegations. See *National Telephone Directory*, supra, citing *Blue Flash Express*, supra. On that basis, I recommend dismissal of this allegation of the complaint.[22] (

[22] Had there been some corroboration of this testimony, through Kepler's testimony or otherwise, I would be inclined to credit Thompson's statement. Delmas Conley's denials of the conduct alleged in this incident were the products of leading questioning, and, as mentioned, his general credibility is undercut by the fact that R.J. Conley contradicted Delmas' testimonial denials of other allegations. Thompson's statement is plausible as is the explanation that he initially failed to inform the Board about the conversation because of the promise extracted by Delmas Conley to keep the conversation "off the record."

2. Paragraphs 6(b) and (c)

The General Counsel alleges that on or about December 23 Delmas Conley invited union supporters to leave their employment with Conley Trucking (par. 6(b)) and threatened to sell and/or close the business in the case of unionization (par.6(c)).

These comments are alleged to have been made during an employee meeting that Delmas Conley led for the drivers. The meeting was held on the morning of December 23 at the truck shop. This was at least a month after the Teamsters had met with supporters in November and informed them that the Union was abandoning the organizing effort. However, Conley Trucking obviously was unaware of this for some period of time and was still mailing literature to employees opposing unionization as late as December 6.

Conley held these meetings once or twice a year. The winter meeting was usually held just before Christmas and Christmas gifts and hams were handed out. This year's meeting, coming as it did on the heels of the failed union drive, had a querulous tone to it.[23]

R.J. Conley admitted that at the meeting Delmas Conley stated, "[T]hat he wanted to stay non-Union and that he would not like outside people telling him how to run his business." In his affidavit, Thompson recalled a similar comment, stating that at the meeting Delmas Conley complained that "a few drivers had tried to bring in an outside group but it didn't work." According to Thompson's statement, Conley stated that "he built the company and that no outside source would run it."[24]

In regard to complaint allegation paragraph 6(b), R.J. Conley admitted that Delmas Conley stated, "[T]hat if employees want to work for a Union trucking company that he preferred that they go work somewhere else rather than Unionize his facility." Thompson's statement quotes Delmas Conley as saying that "if you want a company to run, go get your own." I find that Delmas Conley made these statements,[25] and that they violated the

[23] In his affidavit, Thompson drew a picture of Delmas Conley as a man still feeling the insult, but also vindication from the failure of the recent union drive. The meeting provided a platform for Conley to threaten employees over a variety of work-related issues. Seasonal cheer was decidedly absent, and Conley closed the meeting by saying "that Rodney Holden had our Christmas hams and that if we didn't want them, he would give them to his dogs."

[24] I find that Delmas Conley made these statements. Conley testified that he could not remember whether or not he mentioned anything about outsiders running the Company. He testified that he "could of" and "I'm not saying that I didn't," but "if I said something like that it was probably taken in the wrong context." I credit R.J. Conley's testimony on this point over Delmas Conley's equivocation, and find support for R.J. Conley's admissions in Thompson's very similar account, which is also credited. General Counsel does not allege that Respondent violated the Act with these comments.

[25] For his part, Delmas Conley admitted that at the meeting he said that if people didn't want to work at his Company he had no problem with that. I think that this is very much akin to the comments attributed to him by R.J. Conley and Thompson, but I think Delmas is trying to make the comment somewhat more palatable than what was actually said. I credit R.J. Conley's account and Thompson's. I discredit Del-

Act. The invitation to employees "to go work somewhere else" if they "want[ed] to work for a Union trucking company" was clearly a response to the Section 7 activities of employees and as such unlawfully coercive and an implicit threat of termination. *Chinese Daily News*, 346 NLRB 906, 920 (2006) (violation of Section 8(a)(1) to tell employee to resign if she was not happy with her job); *McDaniel Ford, Inc.*, 322 NLRB 956, 956 fn. 1, 962 (1997) ("It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved.").

In support of complaint allegation paragraph 6(c), General Counsel points to Delmas Conley's statements at the December 23 meeting, admitted to by R.J. Conley, that "if the employees wanted more control over [the] business that they could buy and drive their own truck rather than Unionize his facility and added that he would sell them a truck and would, in fact, sell them his entire business." Delmas Conley essentially admitted to the same. I find that Delmas Conley made these statements, and that they are violative of the Act. This was not a business offer. Conley was telling employees that in retaliation for their desire to unionize he was willing to radically alter the employer-employee relationship. Reasonably, what the employees heard is that their employer was suggesting he would end the employer-employee relationship should they unionize. The threat of reprisal for union activity in the comment is manifest and violative of Section 8(a)(1).

3. The 8(a)(1) and (3) allegation

a. Facts

(1) Gilbert's termination

Gilbert worked as a truckdriver for Conley Trucking from July 4, 2004, to October 28, 2005. On Friday, October 28, 2 days after R.J. Conley told Thompson that he knew that Thompson, Delabar, and Gilbert were at a union meeting, Gilbert was terminated.

On Thursday October 27, Gilbert's daughter called him at work and told him his wife had been brought to the hospital emergency room and may have had a stroke. Gilbert finished up his work and at about 4 p.m. went to the office and told Rodney Holden that "he needed to tell R.J. I may not be in tomorrow because my wife, they thought she had a stroke." Holden said he would tell R.J. Conley. Gilbert then left and went to the hospital.[26]

Later that evening Gilbert's wife was discharged from the hospital with instructions to go to her family doctor in the morning. That evening, Gilbert telephoned work and left a message on the answering machine of Conley Trucking's office assistant, Tyleah Mullins, stating that he would not be in the following morning because he had to take his wife to the doctor. Gilbert had used this method in the past to call off work, and according to Holden it was a method routinely used.

The following morning Gilbert took his wife to the family doctor who advised that she needed to return to the emergency room immediately. Gilbert took his wife there and she was admitted. Between 2 and 3 p.m. Gilbert left the hospital and, accompanied by his daughter, went to Conley Trucking to pick up his paycheck. Gilbert waited in the car and his daughter went to pick up his pay envelope but she did not find it in his mailbox (each driver had a box or cubby to receive pay and other items). Gilbert then saw Holden exit the office waiving a pay envelope, and Holden approached the car and handed Gilbert the envelope. Holden asked "[H]ow the wife was doing and I told him they thought she had a stroke. And he said, I hope she gets better." That was all that was said and Gilbert and his daughter proceeded to leave and began exiting the parking lot. As they were leaving Gilbert's daughter opened the envelope and inside they found not just his pay check but a termination notice and "settlement statement." Gilbert was "shocked" as no one from Conley Trucking had warned him that he would be discharged or spoke to him about it.[27]

R.J. and Delmas Conley testified that the decision to terminate Gilbert was made the morning of October 28. R.J. testified that when he arrived at work a little after 8 a.m., Delmas Conley and office assistant Mullins were already at work. Mullins told R.J. that there was a message from Gilbert saying that his wife was sick and that he would not be at work.[28]

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mas Conley's later testimony, in which he unequivocally denied inviting union supporters to leave his employ.

[26] Gilbert testified credibly, and specifically, that when he had this discussion "Rodney Holden was coming out of the back office talking to Mike Wyatt . . . [r]ight at the doorway coming out of the second office, towards the front office, right there in the doorway." Holden denied the conversation in response to a single question posed by counsel:

> Q. Now I'm going to draw your attention to the day before his termination, which would be October 27th, 2005. On that date did Tim Gilbert tell you that he may not be in, that his wife may have had a stroke, meaning he may not be in the following day because his wife may have had a stroke?
>
> A. No.

This was the only testimony offered by Holden on this subject. When the sum of the testimony is a witness's one-word denial it can leave the impression that the witness cannot be trusted to answer open-ended questions about the subject. That was the impression I had here. Completely unaddressed by Holden's testimony is whether he and Gilbert talked at all on October 27, and if so what they discussed. I credit Gilbert's specific recollection and explanation of the conversation with Holden. See *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), enfd. 309 F.3d 452 (7th Cir. 2002) ("it is settled that general or 'blanket' denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses").

[27] Holden testified that Gilbert received his pay and termination papers "as all the drivers do," by retrieving it from his mailbox. That is an implicit rebuttal of Gilbert's testimony, but Holden was not asked and did not specifically deny or rebut speaking with Gilbert, asking about his wife, or handing Gilbert his pay envelope. I credit Gilbert's specific account of the incident, which was not addressed by Holden.

[28] Conley testified that Mullins did not say anything to him about Gilbert's wife going to the hospital or having a stroke, only that Gilbert had left a message that he would be absent because his wife was sick. Conley did not listen to the message and testified that he had "no idea" that Gilbert's wife was hospitalized when he terminated Gilbert. I doubt this. That Mullins and Holden knew about Gilbert's wife can be

When Delmas Conley came over from the truck shop, R.J. and Delmas made the decision to terminate Gilbert. The explanation at trial offered by R.J. was "we've had some trouble with Tim Gilbert" and he alluded to an "extensive list of problems" that he alleged contributed to the decision. Based on his testimony as a whole, it is clear that these problems included generally his attendance and his missed loads (i.e., deliveries), and several specific incidents involving accidents, missing a mandatory day of work, shirking work, and a drinking incident. Delmas Conley explained that he and R.J. talked about Gilbert that morning and "decided we probably should let him go." Conley testified that there were "a lot of different reasons":

> There were several reasons. One of them was I was just afraid of the boy. He had a lot of accidents, he didn't pay attention, I was afraid he was going to kill somebody. He didn't show up for work on time, he didn't get his loads, very undependable, and we just thought—or I thought enough was enough.

When Rodney Holden arrived at work at 9 a.m., R.J. instructed him to write up the termination paper and figure out the back wages owed to Gilbert. Under "Reason For Termination," the termination notice for Gilbert listed only "Absenteeism/Tardiness." Other options on the form listed as possible reasons for termination (performance, job change, violation of policies/procedures, personal, other) were not marked. Under the employee evaluation grid listed on the termination notice there are nine performance factors that can be marked. Gilbert's termination notice only marked two, attendance and dependability, and in each Gilbert was rated unsatisfactory. Other factors such as initiative, cooperation, job knowledge, job productivity, and work safety were not marked. (GC Exh. 15.) All of the other termination notices entered into the record were more thoroughly completed. (See GC Exhs. 9, 10, 12, 22.)

R.J. instructed Holden to sign R.J.'s name to the termination notice. In all of the other termination notices entered into the record, Rodney Holden signed them using his own name. R.J. Conley testified that he had Holden sign his name on Gilbert's because "I terminated Gilbert." According to R.J., the other termination notices involved employees who quit or "self terminated," i.e., were terminated after abandoning the job.[29]

(2) Gilbert's work record; other employees

From November 1, 2004, to January 1, 2006, the employees let go from Conley Trucking were Gilbert, Roger Rosenogle, Jonathan Bellomy, Terry Bell, and Robert Whitley. Although there were termination reports for each of these employees, Rosenogle, Bell, and Bellomy actually quit or "self-terminated" because they stopped coming to work. Rosenogle and Bellomy were rehired. Thus, with the exception of Gilbert, the only employee involuntarily discharged during this period was Whitley, who was discharged November 16 for" "wrecking trucks."

At the hearing, Respondent devoted significant effort to showing, successfully I think, that Gilbert was a poor employee. Respondent complained about the following:

Absences. Gilbert had a significant number of absences. However, others had more absences than Gilbert. Respondent's absentee policy permitted seven unpaid sick or personal days per year. After use of those days, any days missed were to be deducted from the paid vacation days to which an employee was entitled after 12 months of work (R. Exh. 2). In practice, the Conley's could and did approve additional absences for employees, for reasons from illness of a family member to attending children's sporting events. According to the attendance calendar, Gilbert was off for 16 days in 2005 for a combination of personal or sick days, family illness or family medical leave, medical appointment, or unexcused absence. Four of these 16 were unexcused absences. (GC Exh. 6.) By contrast, Bellomy had 36 absences (most of which were unexcused) by June 3 (see GC Exh. 7A) at which time he was considered to have self-terminated for excessive absences, but then he was immediately rehired and had at least 20 more absences (most unexcused) for the rest of 2005 before he stopped coming to work and was terminated in January 2006 for absenteeism (GC Exh. 10). Bell was hired April 26 and 19 absences are recorded on the attendance calendar for 2005. (GC Exh. 7B.) Bell was not discharged but quit without notice in February 2006 (GC Exh. 12). Employee Charles Floyd missed 31 days of work in 2005. (GC Exh. 7D.) Joseph Stanley was rehired (previous work records are not in the record) in August 2005. He missed 24 days of work in 2005. (GC Exh. 7F.) James Wollard missed 19 days in 2005. (GC Exh. 7G.) Respondent developed a letter (GC Exh. 8) that was sent to certain employees in an effort to get them "to do a little better" with absences. Gilbert never received such a letter or any other discipline related to his attendance.[30]

discerned, not only from Gilbert's credited testimony but from the attendance calendar that Respondent maintained for each employee. The attendance calendar for Gilbert (GC Exh. 6) indicated "Wife in Hospital" in the "Notes" section on page 2. The calendar for October 28 was marked "FM" which, according to the key on GC Exh. 6 stands for Family Medical Leave. According to the testimony, Rodney Holden usually filled out the attendance calendar daily for each employee and he filled it out based on "call off" messages like the one left by Gilbert. Holden and Mullins (who was characterized by Conley as a "very thorough" employee and received the phone message from Gilbert) knew that Gilbert's wife was in the hospital. It is hard to believe they would not inform Conley of this, particularly when they learned that Conley planned to terminate Gilbert. Terminations were exceedingly rare events but drivers calling off work without adverse consequence, for all manner of serious and unserious reasons, was common. I note further that Thompson knew about Gilbert's wife that day, suggesting that the information was widely known.

[29] In fact, the termination notice for the one other employee terminated (as opposed to "self-terminating), Robert Whitley, was signed in Holden's name (GC Exh. 22).

[30] Based on a document created by Respondent for litigation (GC Exh. 5), it argues that Gilbert did not show up for work on 7 days more than the 16 (plus 1 day for discipline for the incident March 9, discussed infra) marked on the attendance calendar. It is hard to know which is accurate, but Respondent concedes that if Gilbert's attendance calendar understates his days off, then the calendars kept for other drivers understates theirs as well. This would be consistent with GC

Missed loads. Gilbert had an unusually high number of missed "loads," i.e., missed deliveries. Counsel for the General Counsel stipulated that (revised) Respondent's Exhibit 3 correctly lists the missed loads for employee. That document indicates that Gilbert had 69 missed loads, the most of any employee, for the period November 2004 through December 2005. This document was not relied upon (or in existence) when Gilbert was discharged, but was created for litigation. Gilbert was never disciplined for missed loads at any time. R.J. Conley had no specific recollection of ever talking to Gilbert about missed loads but believed he did, but only "because I talk to every one of my drivers about missed loads." Jeremy Thompson, who did not have as many missed loads as Gilbert, but had the second most (R. Exh. 3; lists 66 missed loads, just 3 less than Gilbert) was never talked to by anyone regarding missed loads.

In addition, at trial, Respondent focused on several incidents within the year before Gilbert's termination that Respondent contends contributed to the decision to terminate Gilbert.

Intoxication incident. The night of March 9 Gilbert and some other Conley Trucking employees ended up in the Conley parking lot drinking. Gilbert fell asleep there in his car. He was scheduled to work in the morning but Gilbert was still intoxicated and, as he testified, "I knew I was in no shape to drive." Another employee, James Wollard called R.J. Conley and told him about the incident and Conley went to the parking lot and found Gilbert there. Gilbert told him that "he had a bad night." Conley told Gilbert to "go home and sleep it off." Gilbert was called to the office given a warning notice signed by Rodney Holden regarding the incident. (GC Exh. 3.) There was no repeat of the incident, or any incidents related to alcohol.[31]

Jackknifed truck. Another incident cited by Respondent occurred July 11 when Gilbert "jackknifed" a Conley truck.[32] Gilbert testified that he crested a hill and when he saw a wreck at the bottom he "panicked and slammed the brakes." R.J. Conley believed that Gilbert was traveling too fast. The sheriff's department was on the scene (for the initial accident) and witnessed this incident. Gilbert was not cited. Gilbert testified that when he returned to work he told Rod Conley about it, and Conley "went over and looked at the truck and grinned and kind of laughed a little bit and said you bent it up pretty good." Rod Conley did not testify and Gilbert's testimony on this point is uncontradicted. Gilbert testified that R.J. Conley did not talk with him about the incident and denied that anyone complained about the cost of repairs. In conflict with this, R.J. Conley testified that he gave Gilbert "a talking to" about this incident, but no written warning or other discipline. Conley testified that it cost about $1000 repair the truck.[33]

Backed his truck in to a coemployee's truck. R.J. Conley also testified that in September 2005, Gilbert backed his truck into a truck driven by employee Delabar and ruined the canvas tarp on the truck. Conley did not discipline Gilbert for this incident.[34]

Backed his truck into another coemployee's truck. R.J. Conley also testified that, in an incident for which no time period was provided, Gilbert backed into the truck of driver Charlie Floyd. Gilbert did not report this incident and Conley says he learned of it from Floyd a few days later. Conley presumed that Gilbert did not mention it because he "probably just thought it wasn't a big deal." Conley testified that he later talked to Gilbert about the incident but did not discipline him. Although Conley testified at trial that the accident with Floyd contributed to his decision to terminate Gilbert, he did not mention this incident in his sworn affidavit taken during the investigation of the case. Gilbert denied any knowledge of this incident. Given Respondent's vagueness about when this incident occurred, Gilbert's denial, the failure to mention it in pretrial affidavits when listing reasons for the discharge, and the lack of substantiation of the incident, I find that it did not happen.

Missing a mandatory day of work. R.J. Conley also contended that one of the reasons for Gilbert's termination was his alleged failure to work on Saturday, October 22, a day that Delmas Conley declared to be a mandatory workday.[35] However, I find that Gilbert did attend work that day, and that R.J. Conley's claim that he did not is unfounded. According to Gilbert, in testimony not disputed by R.J. Conley, Gilbert had asked R.J. Conley in advance for the day off so that he could cut firewood for the coming winter. Gilbert's testimony that R.J. approved the day off was undisputed by Conley. However, R.J. Conley then left for vacation in Mexico, leaving the operation in his father's hands. After R.J. left, Delmas Conley posted a notice declaring Saturday to be a mandatory workday and stating that "if you missed that Saturday don't bother coming in Monday." Although not happy it, Gilbert testified that he

Exh. 20, which Respondent created for litigation and which lists higher numbers of absences for each employee discussed in the text than is reflected on their attendance calendar.

[31] There was a minor discrepancy in the testimony regarding the aftermath of this incident. Gilbert testified that he called R.J. Conley, they talked about the incident, and Conley told him to return to work the next day. Conley testified that Gilbert was called to the office the next morning and they discussed the matter then. Gilbert also maintains (in uncontradicted testimony) that although the warning notice indicates it was signed March 10, the day after the incident, in fact Gilbert did not come into the office and sign the warning for several days after the incident. In any case, there is no dispute that the incident happened and no dispute that the only discipline was Conley's oral warning and the written warning signed by Holden.

[32] R.J. Conley described "jackknifing" as when the truck and trailer it pulls are no longer aligned but come together side-by-side like the closing of a pocket knife.

[33] In later testimony, Conley estimated that the cost was $2000 to $3000 to repair the truck. However, the latter testimony is inconsistent with his pretrial affidavit, in which he gave the $1000 figure for the cost of the repair, and I credit the former testimony.

[34] Conley claimed he gave Gilbert "a talking to" about this incident, and claimed that repair of the tarp cost over $1000. However, Respondent failed to supply any records substantiating this repair (claiming they keep none for repairs done in house) and Gilbert denied that he was ever talked to about the incident. I credit Gilbert's account.

[35] There was conflicting testimony of whether the mandatory Saturday in question was October 15 (Tr. 78) or the following week, the 22nd, which was the period R.J. Conley was away in Mexico (Tr. 279). R.J. Conley seemed sure that the mandatory Saturday, called by Delmas after R.J. departed on vacation, occurred during his vacation. Further, the absentee calendar (GC Exh. 6) lists Gilbert as off work sick for Friday October 13, 14, 15, and 17. In view of these factors, I find that the Saturday in question was October 22.

came to work on Saturday despite his prior discussion with R.J. Conley. Although at one point in his testimony R.J. Conley testified that he was told by Gilbert that he was absent that day because he had to cut firewood, his later testimony undercuts this claim. When asked whether or not Gilbert missed the mandatory Saturday, R.J. Conley stated that "I thought he did but I wasn't here." I find that he doesn't know whether or not Gilbert was present that day. The attendance calendar does not reflect an absence for Gilbert that day. Finally, no other witness, including Delmas Conley or Rodney Holden (who were there that Saturday) addressed the issue of whether Gilbert attended work on the mandatory Saturday.

Shirking work. Finally, in his testimony, R.J. Conley related an incident approximately 1 week before Gilbert's termination in which a friend who owned a parts store told Conley that two Conley trucks had been sitting by the side of the road for at least 2-1/2 hours. A car accident on their route delayed traffic and Conley assumed that rather than deliver their loads through the traffic and return home late that evening, Gilbert and Delabar decided to skip out on the loads. Conley gave them "a talking to" but no discipline when they returned.

B. Discussion

Section 8(a)(3) of the Act provides, in relevant part, that it I "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 934 (2006).

The General Counsel contends that Timothy Gilbert was discharged in violation of Section 8(a)(1) and (3) of the Act by Respondent because of his activity in support of the Union, namely his attendance at a union meeting on October 23 which Respondent learned about and for which Respondent retaliated. Respondent denies any unlawful motive for Gilbert's discharge. Respondent contends that Gilbert was a poor employee, and that with his absence from work on October 28 "[e]nough was enough," and Conley Trucking decided to discharge Gilbert.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line,* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that the employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action.

Proof of such discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1185 (2004), enfd. 176 LRRM (BNA) 1217; *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).[36] This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive.") (Internal quotations omitted.)

Where the General Counsel makes an initial showing under *Wright Line*, the burden shifts to the Respondent to establish that it would have taken the same action even in the absence of union activities. *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must "persuade" by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct.[37]

Of significance here, however, when evaluation of the General Counsel's initial case, or Respondent's defense, includes a finding of pretext, this "defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.*, supra at 898; *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). "This is because where the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied on—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Rood Trucking*, supra, citing, *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Turning to General Counsel's initial burden, to carry this burden the General Counsel must show "(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action." *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994)).

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[36] "To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." *Robert Orr/Sysco Food Services*, supra.

[37] *NLRB v. Transportation Management,* supra at 395 (rejecting employer's claim that its burden is met by demonstration of a legitimate basis for the discharge); *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006). ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities.") *Weldun International*, 321 NLRB 733 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must 'persuade' that the action would have taken place absent protected conduct by a preponderance of the evidence.") Internal quotation omitted.

In this case, there is no question that Gilbert engaged in protected activity by attending the union meeting. Second, Respondent was aware of Gilbert's protected activity. It is clear that R.J. Conley knew because, as I have found, he unlawfully told Thompson he knew on Wednesday October 26—3 days after the union meeting and 2 days before Gilbert's discharge. Conley told Thompson, "I heard something today." [Thompson] said, "[W]hat's that?" He said, "I heard you, Tim Gilbert, and Steve Del[a]bar were trying to get a union in here." Moreover, even in the absence of this direct evidence of knowledge, the suspicious timing of Gilbert's discharge only 2 days later is a factor that will give rise to an inference of an employer's knowledge of an employee's union activity. *La Gloria Oil & Gas Co.*, supra at 1123 ("the timing of the discharge in relation to [the supervisor's] learning of the activity supports a finding that [the supervisor] knew of the activity and knew who had been involved"); see also *Metro Networks, Inc.,* 336 NLRB 63 (2001) (Board can infer knowledge from the timing of the discharge); *Medtech Security, Inc.*, 329 NLRB 926, 929–930 (1999).

There is also evidence that Gilbert's union activity motivated Respondent to discharge him. Most significant is that Gilbert was terminated 5 days after attending the union meeting and just 2 days after Conley told Thompson that he learned about Gilbert's protected activity. The Board has long recognized that in discrimination cases "the timing of the [employer's conduct] is strongly indicative of animus." *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d. 801 (5th Cir. 1993); *La Gloria Oil & Gas Co.*, supra at 1124; *Yellow Transportation, Inc.*, 343 NLRB 43, 48 (2004); *Structural Composites Industries*, 304 NLRB 729, 729 (1991). Moreover, Respondent's animus towards unionization is supported by Conley's unlawful statement to Thompson, which gave the impression that Respondent was watching the union activity. Finally, Respondent's animus is also demonstrated by Delmas Conley's subsequent unlawful threats and comments at the employee meeting where, in an angry speech attacking employees he declared that "he wanted to stay non-Union and that he would not like outside people telling him how to run his business" and essentially claimed victory, stating that "a few drivers had tried to bring in an outside group but it didn't work." In that meeting he also announced that "if employees want to work for a Union trucking company that he preferred that they go work somewhere else rather than Unionize his facility." Particularly in this context of animus, the timing of Gilbert's discharge is highly suspicious because it could not help but send a message to employees in accord with that pronounced by Delmas Conley on December 23: employees who wanted to work for a union trucking company should work elsewhere.[38]

Without more, the record easily supports the finding that General Counsel has proven that unlawful motivation was a substantial factor in the discharge. But there is more, as Respondent's explanation for Gilbert's discharge is suspect. The odor of pretext cannot be washed from Respondent's defense.

In evaluating whether Gilbert's protected activity was a substantial or motivating reason for Conley Trucking's discharge of him, the anomaly of the discharge stands out. It was after all, with the exception of employees who "self-terminated" for ceasing to attend work at all, the first and at the time only discharge of an employee for which there is any record evidence. What motivated this anomaly? At trial, Respondent reached back into Gilbert's employment history and asserted that months of absences, accidents, poor performance, and the drinking incident all came together to render his calling off of work to be with his ill wife on October 28 the proverbial final straw. In other circumstances, this would not be an inconceivable defense, but here it is not credible. Indeed, the litany of Gilbert's failures as an employee more prominently raises the question of why his consistently poor performance, of so little apparent consequence or concern to the employer—only the drinking incident 7 months prior was even of the subject of a written warning, the rest did not even warrant a remark in his personnel file—suddenly, on October 28, when combined with a standard practice for Gilbert and others to call in and let the employer know that he would not be at work that day, roused management to terminate him. The obvious explanation is that it was retaliation for Gilbert's attendance at a union meeting 5 days earlier, which R.J. Conley let Thompson know he knew about 2 days earlier. Of course, Respondent denies it knew about Gilbert's attendance, but I do not believe that and have found that it did. That leaves coincidence as the potential lawful explanation for the timing of the discharge, but I do not believe that either, because Respondent's proffered explanation for the discharge is not trustworthy.

First of all, the nonchalance with which Respondent claims to have decided on and carried out the (then) unprecedented act of discharging an employee is not the most important factor in my evaluation, but it is striking. Putting aside the employees who "self-terminated" by failing return to work, the record evidence reveals not one other employee who had been discharged from employment as of October 2005. There is a noticeable vagueness in the testimony of Delmas and R.J. Conley regarding what they discussed when they abruptly decided to discharge Gilbert the morning of October 28, ostensibly for calling off work. There is no hint that they were angry or had been thinking in the past of discharging Gilbert. They just fired him for calling off work, a practice that the attendance calendars of other employees show was quite common at Conley Trucking.

Even more suspicious, while Respondent claimed at trial that Gilbert's poor performance in just about every conceivable category of employee performance contributed to the decision to discharge him, that is not the explanation that Respondent

[38] Notably, the fact "[t]hat Respondent did not discipline all employees who attended the union organizing meeting does not alter the findings made herein. A discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar actions against all union adherents." *Master Security Services*, 270 NLRB 543, 552 (1984); *NLRB v. W.C. Nasors Co.*, 196 F.2d 272 (5th Cir. 1952), cert. denied 344 U.S. 865. In fact, it is not surprising that an ill-motivated employer would choose a marginal employee to discharge. It is not only easier to defend, but costs the employer less while allowing a warning of the risks of union activity to be sent to remaining employees.

gave at the time of the discharge. At the time of the discharge, as explained in the termination notice, the "reason For Termination" given on Gilbert's termination notice listed only "Absenteeism/Tardiness." Other options on the forms, advanced at trial by Respondent as contributing to Gilbert's discharge (performance, job change, violation of policies/procedures, personal, other) were not marked. The employee evaluation grid listed on the termination notice only addresses two of the nine listed performance factors, attendance and dependability, and in each Gilbert is rated unsatisfactory. Other factors such as initiative, cooperation, job knowledge, job productivity, and work safety were not marked. (GC Exh. 15.) No explanation for the disparity between the reasons given for Gilbert's discharge at the time of his discharge and the growing list of contributing factors that blossomed at trial was proffered. By itself, the shifting explanations for the discharge add to the General Counsel's case and undermine Respondent's defense under well-settled Board precedent. *Atlantic Limousine*, 316 NLRB 822, 823 (1995).[39]

Had Respondent terminated Gilbert, as reflected in the termination report, simply for absenteeism, it would have had the virtue of being consistent with Respondent's demonstrated apathy towards other aspects of Gilbert's performance for months before the discharge. But it would have had the vice (in addition to being inconsistent with Respondent's position at trial) of being a particularly unconvincing explanation of Respondent's decision to take action against Gilbert. As discussed supra, numerous other employees had absenteeism records worse than Gilbert's and yet they were not discharged. See, supra. Absenteeism was rife among employees. Indeed, Gilbert was not even among the employees to receive the attendance warning letter developed by Respondent to encourage employees prone to absenteeism "to do a little better." (GC Exh. 8.)

Attendance was not a plausible reason for Gilbert's discharge. That is why as part of the investigation and in preparation for trial in this case Respondent culled its managers' memory for incidents and shortcomings that could offer a post hoc and legitimate rationale for Gilbert's discharge. In short, Respondent developed a pretext. See *La Gloria Oil & Gas Co.*, supra at 1124 ("in light of the fact that this prior conduct did not even result in the giving of a disciplinary memo, we find that these prior incidents were suddenly dredged up to mask a discriminatory intent"). And even these incidents are suspect. As discussed, supra, I do not accept the claim that Gilbert did not work the mandatory Saturday. That R.J. Conley would claim that this was a basis for Gilbert's discharge when the evidence showed that he actually did not know whether Gilbert worked that day speaks volumes about the validity of Respondent's explanation for the discharge offered at trial. I also do not accept that Gilbert had a truck accident with an employee named Floyd, or if he did that it had anything to do with Gilbert's discharge. It is true that Gilbert missed more loads than any other employee, but Respondent did not have documentation developed at the time of Gilbert's discharge to know this with any precision. I recognize that Respondent's managers would have a good feel for which employees miss a lot of loads and no doubt were aware of Gilbert's failings in that regard. But I don't see how they could readily distinguish Gilbert in this regard from, for instance, Thompson, who in fact missed only three less loads than Gilbert. As far as the record reveals, Thompson was never disciplined or threatened with discharge due to missed loads and neither was Gilbert.

What we are left with is that Gilbert was not a stellar employee, who, with his drinking incident, two driving mishaps, poor (but not as bad as many others) attendance, and an abysmal record of missed loads worked steadily without incident until the employer learned (and unlawful discussed with Thompson) that Gilbert was involved with union activities. Only then was he fired, ostensibly for absenteeism, later expanded to encompass any and all other shortcomings, real or invented, for litigation. The Act protects both stellar and poor employees, and those in between, from unlawfully motivated discharge. The salient truth is that Gilbert's many failings as an employee did not endanger his job until the employer discovered Gilbert's union activity. Then he was quickly fired on specious grounds.

I find that Respondent's stated reasons at the hearing for discharging Gilbert are pretextual and an attempt to disguise the fact that antiunion animus was the true motivation for the discharge. This conclusion not only adds further weight to General Counsel's case but pretermits the "need to perform the second part of the *Wright Line* analysis." *Rood Trucking*, supra. Respondent's discharge of Gilbert violated the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent Delmas Conley d/b/a Conley Trucking is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party General Truck Drivers and Helpers Union Local #92, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of employees' union activity.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees that bargaining with the Union would start from zero.

5. Respondent violated Section 8(a)(1) of the Act by inviting union supporters to leave their employment with Conley Trucking.

6. Respondent violated Section 8(a)(1) of the Act by threatening employees that it would end the employer-employee relationship by selling employees the trucks and business if they chose union representation.

7. Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Timothy Gilbert because he engaged in

[39] Notably, the notices of other employees who had "self-terminated" were thoroughly filled out with each item in the "employee evaluation" addressed. (See, e.g., GC Exhs. 9, 10 and 12). In addition the termination notice of the one employee terminated for cause after Gilbert, Robert Whitley (GC Exh. 22), is far more indepthly filled out than Gilbert's, again, with each item on the evaluation filled out. Thus, the brevity of comments on Gilbert's termination form is itself an unexplained departure from Respondent's practice when terminating employees.

activities in support of union representation and to discourage other employees from engaging in these and other protected activities.

8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged employee Timothy Gilbert as of October 28, 2005, must offer Gilbert reinstatement to the position he occupied prior to the suspension, or to an equivalent position, should the prior position not exist, without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall make Gilbert whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall remove from its files, including Timothy Gilbert's personnel file, any reference to his discharge, and shall thereafter notify Gilbert in writing that this has been done and that the discharge will not be used against him in any way.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Delmas Conley d/b/a Conley Trucking, Portsmouth, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of the General Truck Drivers and Helpers Union Local #92, International Brotherhood of Teamsters, or any other labor organization.

(b) Creating the impression of surveillance of employees' union activity.

(c) Threatening employees that bargaining with the Union would start from zero.

(d) Inviting union supporters to leave their employment with Respondent.

(e) Threatening employees that it would end the employer-employee relationship by selling employees the trucks and business if they chose union representation.

(f) In like and related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Timothy Gilbert full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Timothy Gilbert whole with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings or other benefits resulting from his discharge.

(c) Within 14 days from the date of this Order, remove from its files, including Timothy Gilbert's personnel file, any reference to his discharge, and three days thereafter notify Timothy Gilbert in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Portsmouth, Ohio, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the General Truck Drivers and Helpers Union Local #92, International Brotherhood of Teamsters or any other union.

WE WILL NOT create the impression that we are engaging in surveillance of your union activities.

WE WILL NOT threaten employees that bargaining with the Union would start from zero.

WE WILL NOT invite union supporters to leave their employment with Conley Trucking.

WE WILL NOT tell employees that if they unionize we will end the employer-employee relationship by selling employees our trucks and business.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Timothy Gilbert full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Timothy Gilbert whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Timothy Gilbert, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DELMAS CONLEY D/B/A CONLEY TRUCKING